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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
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10 NATIONAL LABOR RELATIONS
11 BOARD, ON RELATION OF
AMERICAN APPAREL, INC.,

12 Applicant,

13 v.

14 DOV CHARNEY,

15 Respondent.
16

Case No. MC 16-0016-JAK (KK)

FINAL REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

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18 This Final Report and Recommendation is submitted to the Honorable John
19 A. Kronstadt, United States District Judge, pursuant to Title 28 of the United
20 States Code, section 636 and General Order 194 of the United States District Court
21 for the Central District of California.
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23 I.

24 **SUMMARY OF RECOMMENDATION**

25 This is an administrative subpoena enforcement proceeding relating to an
26 action before the National Labor Relations Board (“NLRB”) on an election
27 petition seeking certification of a labor union. On February 4, 2016, the NLRB
28 filed an Application for an Order Requiring Compliance with Administrative

1 Subpoena Duces Tecum pursuant to Title 29 of the United States Code, section
2 161 (“Application”) issued to Respondent Dov Charney (“Charney”). ECF
3 Docket No. (“dkt.”) 1, App. For the reasons set forth below, the Court
4 recommends granting the Application in its entirety.

5 6 II.

7 **BACKGROUND**

8 On November 12, 2015, the General Brotherhood of Workers of American
9 Apparel (“GBWAA”) filed an election petition against American Apparel
10 requesting certification as a labor union and alleging American Apparel declined
11 recognition of GBWAA on August 27, 2015. Ex. 1.¹ On November 13, 2015, the
12 NLRB served a Notice of Representation Hearing, setting a hearing on the petition
13 for November 23, 2015. Ex. 2.

14 On November 18, 2015, American Apparel served a Subpoena Duces Tecum
15 B-1-P6SO5T (“Subpoena”) on Charney, American Apparel’s former CEO. App.
16 at ¶ 6; Ex. 4; Opp. at 2-3; Ex. 5. The Subpoena seeks (1) Charney’s
17 correspondence with the president of the GBWAA and four other individuals
18 previously or presently involved with the GBWAA; (2) records relating to any
19 money Charney paid or loaned to the GBWAA, or organizations allegedly related
20 to the GBWAA; and (3) copies of applications for business licenses that Charney
21 caused to be filed from January 1, 2015 to the present. Ex. 4; Dkt. 4, NLRB
22 Memorandum of Points and Authorities (“Mem.”) at 2-3. On November 20,
23 2015, Charney filed a Petition to Revoke the Subpoena with the NLRB, objecting to
24 the Subpoena on the grounds of (a) relevance, (b) that the Subpoena is overbroad
25 and unduly burdensome, (c) attorney-client privilege and/or attorney work
26 product, and (d) invasion of privacy. Ex. 5.

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¹ Exhibit numbers refer to the Exhibits attached to the Application.

1 On November 20, 2015, American Apparel filed a Statement of Position
2 alleging (1) GBWAA is not a labor organization under the Act; and (2) the
3 involvement of Charney in the GBWAA creates such a conflict of interest that the
4 GBWAA cannot be certified. Ex. 3. On November 23, 2015, American Apparel
5 filed an Answer to the Petition to Revoke the Subpoena. Ex. 6.

6 On November 23 and 24, 2015, Charney failed to appear at the NLRB
7 hearings. Ex. 7.

8 On November 30, 2015, Charney's counsel appeared at the NLRB hearing
9 on his behalf. Ex. 8. At the hearing, the hearing officer declined to enforce the
10 Subpoena at that time, finding there was sufficient information in the record. Id.
11 The hearing officer then closed the hearing and referred the matter to the Regional
12 Director for decision. Id.; Ex. 9. However, on December 28, 2015, the Regional
13 Director, in a written decision, reopened the hearing for the purpose of
14 reconsidering American Apparel's request to enforce the Subpoena, finding the
15 additional information sought in the Subpoena would be useful in rendering a
16 decision on (1) GBWAA's status as a Section 2(5) labor organization, and (2)
17 whether certification of GBWAA would give rise to a conflict of interest. Ex. 9.

18 At the reopened hearing on January 11, 2016, the hearing officer denied the
19 Petition to Revoke and ordered Charney to appear and produce documents
20 pursuant to the Subpoena on January 12, 2016. Ex. 10.

21 On January 12, 2016, Charney failed to appear or produce documents and
22 the NLRB agreed to pursue enforcement of the Subpoena. Ex. 11.

23 On February 4, 2016, the NLRB filed the instant Application. Dkt. 1, App.
24 On March 8, 2016, Charney filed an Opposition. Dkt. 15, Opp. On March 15,
25 2016, American Apparel filed a Reply. Dkt. 16, Reply. The Court finds the matter
26 appropriate for decision without oral argument.

27 On March 24, 2016, the Court issued a Report and Recommendation
28 ("R&R"). Dkt. 17. On April 22, 2016, Charney filed an Objection to the R&R.

1 Dkt. 19. Charney’s Objections are addressed in this Final Report and
 2 Recommendation at footnote 4 and a non-substantive revision to the final sentence
 3 of Section IV.D mirroring the language of the Court’s recommendation in Section
 4 V.

6 III.

7 LEGAL STANDARD

8 The Ninth Circuit has explained that “[t]he scope of [a court’s] inquiry in an
 9 agency subpoena enforcement proceeding is narrow.” NLRB v. North Bay
 10 Plumbing, Inc., 102 F.3d 1005, 1007 (9th Cir. 1996); see U.S. v. Golden Valley
 11 Elec. Ass’n, 689 F.3d 1102, 1113 (9th Cir. 2012). In such a proceeding, the Court
 12 considers three questions: “(1) whether Congress has granted the authority to
 13 investigate; (2) whether procedural requirements have been followed; and (3)
 14 whether the evidence is relevant and material to the investigation.” Golden Valley
 15 Ass’n, 689 F.3d at 1113. If these three questions are answered in the affirmative,
 16 the subpoena must be enforced unless the opposing party shows that the subpoena
 17 is overbroad or unduly burdensome. North Bay Plumbing, Inc., 102 F.3d at 1007.

19 IV.

20 DISCUSSION

21 **A. THE NLRB HAS AUTHORITY TO INVESTIGATE**

22 The NLRB has the statutory authority to issue subpoenas requiring the
 23 production of evidence and testimony during the investigatory stages of an unfair
 24 labor practice proceeding. See 29 U.S.C. § 161(1); North Bay Plumbing, Inc., 102
 25 F.3d at 1008. District Courts can enforce NLRB subpoenas pursuant to Title 29 of
 26 the United States Code section 161, subdivision (2) (“Section 161(2)”).²

27
 28 ² Section 161(2) provides as follows:

1 Accordingly, the Court finds the NLRB had statutory authority to issue the
 2 Subpoena in connection with its investigation into the GBWAA election petition.

3 **B. THE NLRB SATISFIED PROCEDURAL REQUIREMENTS**

4 Section 102.31 of the NLRB's Rules and Regulations provides general
 5 procedures for the issuance of subpoenas and petitions to revoke subpoenas. See
 6 29 C.F.R. § 102.31; North Bay Plumbing, Inc., 102 F.3d at 1008. Charney does not
 7 contend these procedures were not followed. See Opp. Rather, Charney identifies
 8 alleged violations of the NLRB Case Handling Manual and objects to enforcement
 9 of the Subpoena on the following grounds: (a) personal appearance is not allowed at
 10 the pre-complaint phase; (b) the Subpoena does not compel testimony because it is
 11 not captioned as a subpoena *ad testificandum*; and (c) the Subpoena lacks specificity
 12 due to the use of the word "all." Opp. at 6-8.

13 Charney's arguments are meritless. First, Section 102.31 of the NLRB's
 14 Rules and Regulations and Title 29 of the United States Code, section 161(1)
 15 ("Section 161(1)") expressly allow for pre-complaint subpoenas compelling
 16 testimony. 29 C.F.R. § 102.31(a); 29 U.S.C. § 161(1); North Bay Plumbing, Inc.,
 17 102 F.3d at 1008. Second, the Subpoena is clear on its face that it is intended to
 18 compel both testimony and production of documents. See Ex. 4. Third, to the
 19 extent the information sought in the Subpoena is relevant and not overly broad as
 20 discussed below, there is no regulation *per se* prohibiting the use of the word "all"
 21 to describe documents sought in a subpoena.

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 23 In case of contumacy or refusal to obey a subpoena issued to any
 24 person, any district court of the United States or the United States
 25 courts of any Territory or possession, within the jurisdiction of which
 26 the inquiry is carried on or within the jurisdiction of which said person
 27 guilty of contumacy or refusal to obey is found or resides or transacts
 28 business, upon application by the Board shall have jurisdiction to issue
 to such person an order requiring such person to appear before the
 Board, its member, agent, or agency, there to produce evidence if so
 ordered, or there to give testimony touching the matter under
 investigation or in question; and any failure to obey such order of the
 court may be punished by said court as a contempt thereof.
 29 U.S.C. § 161(2).

1 Accordingly, the Court finds the NLRB satisfied all applicable procedural
2 requirements in seeking to enforce the Subpoena.

3 **C. THE INFORMATION SOUGHT IN THE SUBPOENA IS**
4 **RELEVANT**

5 The NLRB must show “only some reasonable basis for believing that the
6 information will prove relevant.” NLRB v. Int’l Medication Sys., Inc., 640 F.2d
7 1110, 1114 n.3 (9th Cir. 1981); see also EEOC v. Children’s Hospital Med. Ctr. of
8 Northern California, 719 F.2d 1426, 1429 (9th Cir. 1983) (en banc) (“When . . .
9 ‘[t]he evidence sought by the subpoena was not plainly incompetent or irrelevant to
10 any lawful purpose,’ it should have been enforced.”) (quoting Endicott Johnson
11 Corp. v. Perkins, 317 U.S. 501, 509, 63 S. Ct. 339, 87 L. Ed. 424 (1943)). A district
12 court defers to “the agency’s appraisal of relevancy, which must be accepted so
13 long as it is not obviously wrong.” N.L.R.B. v. Am. Med. Response, Inc., 438 F.3d
14 188, 193 (2d Cir. 2006); F.D.I.C. v. Garner, 126 F.3d 1138, 1143 (9th Cir. 1997)
15 (citing the Second Circuit standard approvingly).

16 Here, the Subpoena seeks (1) communications between Charney and five
17 named individuals from the date Charney was suspended as CEO of American
18 Apparel to the present, regarding American Apparel, Hermandad Mexicana,
19 “TeamDov,” “Workers United to Save American Apparel,” or the GBWAA;³ (2)
20 documents evidencing Charney’s financial support of Hermandad Mexicana,
21 “TeamDov,” “Workers United to Save American Apparel,” or the GBWAA from
22 the date Charney was suspended as CEO of American Apparel to the present; and
23 (3) applications for business licenses Charney filed from January 1, 2015 to the
24 present.

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27 ³ American Apparel alleges, and Charney does not dispute, that Hermandad
28 Mexicana, “TeamDov,” and “Workers United to Save American Apparel,” are
affiliated with GBWAA. See Opp.; Reply at 2.

1 The Regional Director determined the documents and testimony sought
 2 would assist her in determining the issues presented in the election petition. See
 3 Ex. 9. Charney does not dispute the relevance of the information sought; rather, he
 4 argues the information is merely cumulative. Opp. at 9. Because the NLRB's
 5 appraisal of relevancy is "not obviously wrong," the Court defers to the agency's
 6 finding. See Am. Med. Response, Inc., 438 F.3d at 193; Garner, 126 F.3d at 1143.
 7 Accordingly, the Court finds the information sought is relevant to establishing
 8 Charney's involvement with the GBWAA and whether there exists a conflict of
 9 interest.

10 **D. THE SUBPOENA IS NOT OVERBROAD OR UNDULY**
 11 **BURDENSOME**

12 Finally, Charney argues the Subpoena is overbroad because the NLRB does
 13 not need the information because "it is unlikely that the [NLRB] will change its
 14 inclination regarding whether a complaint should issue." Opp. at 9. This
 15 argument is non-sensical. Despite the hearing officer's initial determination the
 16 additional information was not necessary, the Regional Director determined it
 17 would be helpful in rendering her decision. As discussed above, the Court finds the
 18 information sought is relevant to determining the issues presented by the election
 19 petition. Charney does not point to any categories of information sought in the
 20 Subpoena that would not be relevant to the issue of certification. Hence, the
 21 Subpoena is not overbroad.

22 Charney next makes various arguments challenging the Subpoena, which the
 23 Court finds meritless. First, Charney conclusorily argues enforcing the Subpoena
 24 would violate his privacy. This argument has been squarely rejected by the Ninth
 25 Circuit in North Bay Plumbing, which considered the argument that certain
 26 subpoenas violated "state privacy laws" and rejected it because "investigations for
 27 federal purposes may not be prevented by matters depending upon state law."
 28 North Bay Plumbing, Inc., 102 F.3d at 1009. Moreover, even if state law were

1 applicable, Charney points to no compelling private information that would be
2 disclosed. Nor does Charney point to any applicable federal privacy laws.⁴

3 Second, Charney argues requiring him to produce the business applications
4 “would force him to reveal sensitive proprietary information and confidential
5 details about his business affairs.” Opp. at 9-10. However, the Subpoena only
6 seeks the applications that have already been filed with the State of California. Ex.
7 4. Therefore, there do not appear to be relevant privacy concerns.

8 Third, Charney argues American Apparel is improperly seeking to obtain
9 information about various other lawsuits filed by Charney against American
10 Apparel and requests a protective order limiting disclosure to the NLRB. Opp. at
11 10-11. Contrary to Charney’s claim, the Subpoena does not seek “to obtain
12 testimony from Charney about *anything* related to American Apparel.” See Opp.
13 at 11. The Court finds a protective order limiting disclosure to the NLRB is not
14 appropriate, because it would prevent American Apparel from litigating the action.
15 Moreover, Charney cites to no authority for his position that the NLRB and
16 American Apparel should not have access to relevant information related to the
17 matters under investigation as described in the Subpoena.

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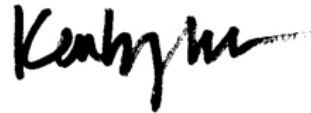
21 ⁴ In his Objections, Charney argues for the first time that the Subpoena violates a
22 federal constitutional right to privacy. Obj. at 3-5. The Court declines to consider
23 arguments raised for the first time in Objections. Charney is represented by
24 counsel who failed to raise this argument in his Opposition, citing no authority
25 except a general invocation of his “privacy rights” (see Opp. at 8), and the
26 arguments in question are neither novel nor unexpected. See Brown v. Roe, 279
27 F.3d 742, 744 (9th Cir. 2002) (“[A] district court has discretion, but is not
28 required, to consider evidence presented for the first time in a party’s objection to a
magistrate judge’s recommendation.”). Moreover, Charney fails to point to any
compelling private information that would be disclosed. In addition, the cases cited
by Charney do not support his position because they involve disclosure of medical
information, see Whalen v. Roe, 429 U.S. 589, 600, 97 S. Ct. 869, 51 L. Ed. 2d 64
(1977), and the presumptive confidentiality of Presidential communications, see
Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 440, 97 S. Ct. 2777, 53 L. Ed. 2d 867
(1977).

V.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an order: (1) accepting the findings and recommendations in this Report; (2) GRANTING the NLRB's Application; and (3) ordering Charney to appear before the NLRB to produce the subpoenaed documents described therein, and answer questions related to the matters under investigation as described in the Subpoena Duces Tecum B-1-P6SO5T.⁵

Dated: April 28, 2016



HONORABLE KENLY KIYA KATO
United States Magistrate Judge

⁵ Charney appears to have abandoned his claim of attorney-client privilege and attorney work product by failing to raise the objection in the Opposition. To the extent Charney maintains production of certain documents would violate his attorney-client privilege or his attorney's work product, Charney shall produce a privilege log and be prepared to produce the disputed documents to the NLRB hearing officer for in camera review.